MOTION FILED
MAR 25 1985

(5)

No. 84-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

MOTION AND BRIEF OF BANKERS TRUST COMPANY, DEFENDANT AND THIRD-PARTY DEFENDANT IN PENDING RELATED CASES, FOR LEAVE TO INTERVENE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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March 21, 1985

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In The
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Bankers Trust Company (hereinafter "Bankers Trust") moves pursuant to Rule 42 of this Court for leave to file a brief as an interested party urging this Court to grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals.

The petition for certiorari was filed on August 15, 1984. On October 9, 1984, this Court requested the Solicitor General of the United States to present his views on the case. The Office of the Solicitor General has not yet filed its position.

Subsequent to the filing of this petition and without notice to Bankers Trust, the New York Supreme Court granted a motion consolidating this action with the previously consolidated four other lawsuits pending in the New York Supreme Court. Justice McCooe granted the motion by the petitioners for an order of consolidation under the New York CPLR stating, "The

liability, if any, of all parties to the plaintiff arising out of the same fact pattern should be determined on one action." (A copy is annexed as an appendix to this brief).

Bankers Trust, as can be seen from the caption in the four consolidated cases, referred to in the petitioner's Reply Brief at pages 1 through 5, is a third-party defendant and fourth-party plaintiff in action no. 1 and a defendant and third-party plaintiff in action no. 2.

Bankers Trust is a commercial bank and is frequently involved in litigation with respect to items deposited by its customers with the bank. In the decision below, the New York Court of Appeals held that ERISA preempts and prohibits a third-party claim in a state court action for contribution and indemnity against the trustees of an employee benefit fund for their breaches of duty in detecting the "misappropriation of approximately $675,000 from the Retail Shoe Health Commission ("The Fund"), an employee welfare benefit plan, by its former administrator, Jerome Simon." (A.6a). The Fund is an "employee welfare benefit plan" within the meaning of Section 3 of ERISA, 29 U.S.C. Section 1002(1).

Bankers Trust, which is now, or soon will be, a party in the consolidated actions, believes the decision below was erroneous for the reasons set forth in the accompanying brief.

Bankers Trust Company, thus, respectfully prays that the court grant this motion for leave to intervene and file its brief.

Respectfully Submitted,

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Bankers Trust Company (hereinafter "Bankers Trust") moves pursuant to Rule 42 of this Court for leave to file a brief as an interested party urging this Court to grant the petition for a writ of certiorari and reverse the decision of the New York Court of Appeals.

This petition is taken from the opinion and order of the New York Court of Appeals, reported in 62 N.Y. 2d 173, which held that ERISA preempts and prohibits a third-party claim in a state court action for contribution and indemnity against the trustees of an employee benefit fund for their breaches of duty in detecting the "misappropriation of approximately $675,000 from the Retail Shoe Health Commission ("The Fund"), an

employee welfare benefit plan, by its former administrator, Jerome Simon." (A.6a).[1] The Fund is an "employee welfare benefit plan" within the meaning of Section 3 of ERISA, 29 U.S.C. Section 1002(1).

As set forth in the moving affidavit of Jack Maltz, the chairman of the Fund, in support of the motion to dismiss the third-party complaint here at issue at paragraphs 4 and 5: (See A.12a; R.29).

> "Mr. Simon died on September 16, 1979. . . . Simon's defalcations, first discovered after discrepancies in check vouchers surfaced in December 1979, were accomplished primarily by Simon's preparation of duplicate vouchers with respect to claims submitted by Fund beneficiaries. Based on these duplicate vouchers, checks were issued and endorsements were forged by Simon, and were negotiated by him, in most cases at Bankers Trust Company."

Simon, the administrator of the Fund's plan, was covered under an indemnity bond of Aetna Casualty & Insurance Co. (hereinafter "Aetna"). Aetna's lawyers, on behalf of themselves and the Fund, filed claims against the estates of Simon and his widow, Eleanor Simon, in the Surrogates Court, Kings County.

Subsequent to the filing of this petition and without notice to Bankers Trust, the New York Supreme Court granted a motion consolidating this action with the previously consolidated four other lawsuits pending in the New York Supreme Court. Justice McCooe granted the motion by the petitioners for an order of consolidation under New York CPLR stating, "The liability, if any, of all parties to the plaintiff arising out of the same fact pattern should be determined on one action." (A copy is annexed as an appendix to this brief at page 13).

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[1] "A" followed by a number refers to the Appendix to the petition for a writ of certiorari; "R" followed by a number refers to the Record filed with the New York Court of Appeals.

The Fund and its individual trustees brought a series of lawsuits in the New York State Courts against various banks, the widow and estate of the dishonest employee, a recipient of the checks, and its former accountants, the petitioners herein. These now consolidated five actions to which Bankers Trust is a party are as follows:

(1) The Fund and its individual trustees instituted the first action against its depository payor bank, Manufacturers Hanover Trust Company (hereinafter "MHT"), to recover $675,634 by virtue of alleged forged endorsements. MHT instituted a third-party complaint against Bankers Trust and various other banks claiming that Bankers Trust and such other banks had guaranteed all prior endorsements on various checks drawn on MHT. MHT seeks to recover from Bankers Trust $621,297.00 of the $675,634.00 sought by the Fund in this action.

Bankers Trust interposed an answer denying liability and asserting various affirmative defenses including: the Fund's own negligence substantially contributed to the making of any forged or unauthorized signatures sued on herein and, therefore, the Fund was precluded from asserting liability by virtue of Section 3-406 of the Uniform Commercial Code; the checks had been issued to a fictitious payee, i.e. an agent or employee of the maker or drawer of the checks referred to in the complaint supplied the maker with the name of the payee intending the latter to have no such interest and, therefore, endorsement by any person in the name of the named payee was effective under paragraph 3-405(1)(b) and (c) of the Uniform Commercial Code; the plaintiff failed to comply with the duties imposed upon it by failing to examine the checks furnished to it; the plaintiff was barred from recovery by virtue of Section 4-406 of the Uniform Commercial Code when it did not, within one year from the time of the statement and items were made available to the customer or did not, within three years from that time, discover and report any unauthorized endorsements; and the plaintiff, as well as its accountants, auditors and other officials were neg-

ligent in failing to detect such alleged improper check endorsements since December 1, 1972.

Because the checks in controversy had been deposited in a joint account maintained by the late Mr. Simon and his wife, Eleanor Simon, at Bankers Trust, Bankers Trust instituted a fourth party action against Eleanor Simon, individually and Eleanor Simon as Administratrix of the Estate of Jerome Simon claiming that the Simons had jointly warranted all prior endorsements of checks deposited in their account. At the same time, Bankers Trust cross-claimed over against Bank Leumi claiming that Bank Leumi had deposited with Bankers Trust and warranted the endorsements of ten items to Bankers Trust. Nine of these ten items had initially been deposited at Bank Leumi by Barrister Shoe, Inc. Bank Leumi proceeded to institute a fourth-party action against Barrister Shoe, Inc.

(2) The second of the previously consolidated actions was instituted by the Fund and its individual trustees against Bankers Trust to recover the sum of $597,526.50 representing the aggregate sum of several hundred checks deposited and/or encashed by Bankers Trust on the alleged forged endorsements of the respective named payee. Bankers Trust asserted the same defenses as were asserted in the action instituted by MHT Co. and, similarly, issued a third-party complaint against Eleanor Simon, individually, and Eleanor Simon as Administratrix of the Estate of Jerome Simon by virtue of the Simons' warranties of prior endorsements.

(3) The Fund and its individual trustees instituted an action directly against Eleanor Simon, individually and as Administratrix of the Estate of Jerome M. Simon. That complaint alleges various causes of action against Mrs. Simon as Administratrix for fraud, monies had and received and for breach of Simon's employee contract. The complaint asserts additional causes of action against Mrs. Simon, individually, for wrongfully having and receiving monies which were directly traceable

to the Fund and were deposited to her accounts. On February 12, 1982, Eleanor Simon died testate and Irving Simon was named her executor. The Fund and the individual trustees petitioned for an order substituting Irving Simon as a party defendant in place of Eleanor Simon, individually, and as administratrix of the estate. The court granted the motion.

(4) The Fund and its individual trustees instituted an action against Barrister Shoe, Inc. seeking to recover $15,095.00 on various checks deposited in that account between August 29, 1972 and November 5, 1974.

(5) The Fund and its individual trustees brought suit in state court, alleging that its former accountants "had failed and neglected to detect and report the misappropriation by Jerome Simon, the administrator of the Fund, of some $765,000 of Fund assets." (A.2.) The accountants, the petitioners herein, denied liability and alleged in both their affirmative defense and in the third-party claims against the trustees, individually, that "the trustees themselves failed in their own fiduciary responsibilities to the Fund, which caused or contributed to the loss. By these allegations, they seek . . . to apportion liability for Simon's tortious conduct among the parties to this action, all of whom allegedly shared responsibility for monitoring the operation of the Fund." (A.6a).

The trustees moved to dismiss the third-party complaint on the basis that the state court lacked jurisdiction to adjudicate the petitioner's claims for contribution because those claims were preempted by section 514(a) of ERISA, 29 U.S.C. section 1144(a) and that the state court lacked jurisdiction under section 502(e) of ERISA, 29 U.S.C. section 1132(e).

The New York Supreme Court denied the trustees' motion to dismiss the third-party complaint holding that the statutory right of contribution and/or indemnification was of "significant interest" to New York State and was only "tangential in nature and are not pre-empted under ERISA". (A.15a). The New

York Court of Appeals reversed in a four to three split decision and held that the state courts lacked jurisdiction from entertaining claims "against the individual trustees of the plan for contribution or indemnity based on allegations that breach of their fiduciary duties by the trustees contributed to the losses sustained by the plan." (A.2a).

Interest of Bankers Trust Company

As we have shown, Bankers Trust is now or will be made a party to this proceeding by order of the state court which granted consolidation on January 23, 1985. The Fund and its trustees recognized the interest of Bankers Trust by making demand on Bankers Trust in 1980 and instituted a lawsuit against Bankers Trust seeking the recovery of in excess of $600,000.

Indeed, the interest of Bankers Trust in this very proceeding is made clear by the moving affidavit of Maltz in support of the motion to dismiss the third party action. Maltz states that "[b]ased on these duplicate vouchers, checks were issued and endorsements were forged by Simon, and were negotiated by him, in most cases at Bankers Trust Company." (R. 29)[2]

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[2]On the basis of this admission by Maltz, the fund is precluded from recovery against Bankers Trust by section 3-405 (1) (c) of the New York Uniform Commercial Code, the applicable law. The official comment to the Code makes it clear that this provision was intended to:

> "include the padded payroll cases, where the drawer's agent or employee prepares the check for signature or otherwise furnishes the signing officer with the name of the payee.
> The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or, if he is not, is at least in a better position to cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee.

(Footnote continued on following page)

In its answer, Bankers Trust makes it very clear that not only is it exculpated by the fictitious payee rule discussed, *supra*, fn. 2, but also the negligence in the administration of the Fund by the trustees and their agents, including the accountants and auditors who admittedly failed to detect Simon's scheme of issuing duplicate checks between December 1972 and 1980, immunizes Bankers Trust from liability under 4-406 of the Uni-

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(Footnote continued from previous page)

> The provision applies only to the agent or employee of the drawer, and only to the agent or employee who supplies him with the name of the payee. The following situations illustrate its application.
> a.) An employee of a corporation prepares a padded payroll for its treasurer, which includes the name of P. P does not exist, and the employee knows it, but the treasurer does not. The treasurer draws the corporation's check payable to P.
> b.) The same facts as (a), except that P exists and the employee knows it but intends him to have no interest in the check. In both cases an indorsement by any person in the name of P is effective and the loss falls on the corporation."

The record is clear that Bankers Trust has an effective defense against the Fund and MHT Co. under section 3-405(1)(c) of the Uniform Commercial Code. The payee, who Simon intended to receive the proceeds of these checks, received the proceeds. Thus, as recognized in the Commentary to the Code and long noted by the courts, the Code rule is no less applicable where the intended payee is a real and not a fictitious person. In *Hall* v. *Bank of Blasdell*, 306 N.Y. 336, 118 N.E. 2d 464 (1954), the New York Court of Appeals noted that a check drawn to a real person is still within the rule (306 N.Y. at 344):

> "The only operative factor is the intent of—as the case may be—the indorser of the drawer. See *Phillips* v. *Mercantile Nat. Bank, supra*, 140 N.Y. 556, 35 N.E. 982; *Coffill* v. *American Exch. Bank, supra*, 1 N.Y. 113; *Matter of Hammer's Estate, supra*, 237 App. Div. 497, 261 N.Y.S. 478, affirmed 261 N.Y. 677, 185 N.E. 789; cf. *Cohen* v. *Lincoln Sav. Bank*, 275 N.Y. 399, 10 N.E. 2d 457, 112 A.L.R. 1424; *Shipman* v. *Bank of State of N.Y.*, 126 N.Y. 318, 27 N.E. 371, 12 L.R.A. 791. If the drawer or indorser does not intend the named payee or indorsee to receive the check, that party is deemed a merely nominal or 'fictitious' endorsee or payee. And since the indorser or drawer could as easily have made the check payable to bearer, the law regards him as having done so."

form Commercial Code. Bankers Trust, nonetheless, exercised its statutory right to seek indemnity from the various other individuals who warranted all prior endorsements to Bankers Trust under CPLR section 1007. Bankers Trust proceeded to institute third-party and fourth-party actions in the previously consolidated cases, *supra*, pp. 5-7.

Reasons for Granting Certiorari

The decision of the New York Court of Appeals in holding that ERISA insulates the trustees of a welfare fund in their individual capacities who personally instituted five lawsuits in state court from being subjected to a third-party impleader action for indemnity and/or contribution is contrary to sound judicial practice which seeks the avoidance of multiplicity of actions and an economical resolution of inter-related lawsuits in one proceeding. ERISA does not preclude the application of the State Uniform Commercial Code to responsibility for the management of checking accounts.

In *Franchise Tax Board* v. *Construction Laborers Vacation Trusts,* U.S. , 103 S. Ct. 2841, 2854-55 (1983), this Court held that ERISA section 502(a) (the civil enforcement provision) "does not purport to reach every question relating to plans covered by ERISA." Further, this Court stated that section 514 (the pre-emption provision) of ERISA.

> ". . . makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans. With important, but express limitations, it states that 'nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking or securities' ".

Although petitioner has characterized the complaint as a negligence action and is seeking contribution in tort, the facts applicable to the five consolidated lawsuits are really concerned with the duty of care owed in the management of the Fund's

checking account at MHT Co. where the plan's Administrator prepared "duplicate vouchers with respect to claims submitted by Fund beneficiaries. Based on these duplicate vouchers, checks were issued and endorsements were forged by Simon, and were negotiated by him, in most cases at Bankers Trust Company", *supra,* p. 4.

In the complaint against the accountants, petitioners herein, the Fund alleged, *inter alia,* that its former administrator ". . . dishonestly and fraudulently misappropriated and converted checks and the proceeds thereof." (R.55)

The accountants are charged with both breach of their agreement and negligence in failing, *inter alia*:

(a) To examine cancelled checks and confirm that payments by the Fund were proper, and

(b) To test the Fund's internal accounting systems. (R.30).

In their third-party complaint, the accountants denied liability and assert that the trustees permitted "the Administrator Mr. Jerome M. Simon to act without supervision, control and/or review." (R. 56).

These issues are identical to the issues alleged by Bankers Trust in its answer to the complaint and recognized under 3-406 of the New York Uniform Commercial Code as an affirmative defense. As noted in the comment to the Uniform Commercial Code, this provision increases the duty of care owed to the drawee by one who sets an instrument in motion.

These actions instituted in the State Courts by the Fund and its individual trustees are plainly within the scope of lawsuits which Congress intended should remain subject to state court jurisdiction unless other aspects of Federal jurisdiction prevail. The liability and responsibility for the management of checking accounts was intended by Congress to remain subject to state law.

As noted by Judge Kaye in her dissenting opinion, the exclusive jurisdiction provision of ERISA "would not prevent the state court from considering [the derelictions of the trustees] when they are part and parcel of defenses to a cause of action premised on state law." (A.7a-8a). A different result should not take place when the trustees are being sued as third-party defendants in the very same action which they themselves initiated. Such a result would permit a participant in a fraudulent transaction to insulate themselves from liability for their own conduct and retain the fruits of the wrongdoing from the claims of the injured party.

The courts have recognized that third-party practice is necessary and helpful in cases involving allegations of forgery with respect to checks and drafts. The principal objective of impleader and third-party practice is recognized to be "as a tool for economical resolution of inter-related lawsuits." *George Cohen Agency, Inc.* v. *Donald S. Perlman Agency, Inc.*, 51 N.Y. 2d 358, 365, 434 N.Y.S. 2d 189, 193 (1980).

This petition presents an important issue in resolving the procedure to be followed by the courts in litigating a claim arising with respect to the management of a checking account by an Employee welfare fund which is subject to ERISA. We believe that the decision of the New York Court of Appeals in declining to exercise jurisdiction over the third-party complaint is incorrect and this Court should grant the petition for a writ of certiorari and reverse the decision of the New York Court of Appeals.

Respectfully Submitted,

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March 21, 1985

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse therefore, 60 Centre Street,
New York, New York 10007

Present: Hon. WILLIAM P. MCCOOE, Justice.

RETAIL SHOE HEALTH COMM.

—against—

CHARLES G. REMINICK, *et al.*

The following papers numbered 1 to 5 read on this motion, submitted No. 176 on Calendar of 1/22/85.

Notice of Motion—Order to Show Cause—and Affidavits Annexed	1-2
Answering Affidavit	4
Replying Affidavit	5
Affidavit Service	3

Upon the foregoing papers this motion for an Order of Consolidation is granted (CPLR 602A). The liability, if any, of all parties to the plaintiff arising out of the same fact pattern should be determined on one action. If delay causes prejudice, a party can move for a severance.

Settle Order.

Dated 23 January, 1985

W. P. M.

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